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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WENDY CARROLL,

Plaintiff and Respondent,

v.

IRENA OVSEPIAN,

Defendant and Appellant.

B212937

(Los Angeles County  
Super. Ct. No. SC 088581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Linda Lefkowitz, Judge. Affirmed.

Charles L. Fonarow for Defendant and Appellant.

Klein & Weisz and Richard A. Weisz for Plaintiff and Respondent.

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Irena Ovsepien appeals from a judgment upon a jury verdict awarding respondent Wendy Carroll the sum of \$39,600, as commission under an exclusive residential real estate lease listing agreement. Appellant contends the underlying lease was void from its inception as a violation of public policy because the intended use of the property was a violation of the city building code. She further contends the court abused its discretion in awarding respondent attorney fees of over \$122,000, a sum she argues grossly outweighed the jury's compensatory damage verdict. We affirm.

### **FACTS**

In 2004, respondent, a real estate salesperson since 1994, was employed by Hilton & Hyland/Christie's Great Estates (H&H). In June 2004, appellant purchased a residence located on Rambla Pacifica in Malibu, California, from Mark Fleischman (Fleischman). Respondent represented both the purchaser and seller in that transaction.

The property was then occupied by a tenant who planned to vacate in March 2005. Appellant already owned another residence in Bel Air, and she intended to use the Malibu property for investment purposes. At the closing of escrow, appellant chatted with Fleischman, who told her he once considered using the property for a health retreat but was currently involved in operating spas promoting a health program called the "Bar Method."

After the purchase, appellant asked respondent to find a tenant for her to lease the property when the present tenant vacated. In approximately August 2004, respondent secured a written exclusive lease listing agreement from appellant for H&H.<sup>1</sup> The period of the exclusive listing ran from July 21, 2004, through July 31, 2005.

The listing agreement was a standard form used by the California Association of Realtors. The form agreement asked for a monthly rent of \$12,500 and provided that the broker's compensation would be 10 percent of the total rent or, if a fixed term lease is

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<sup>1</sup> Respondent later obtained an assignment from H&H of all of its interest in the exclusive lease listing agreement. For discussion purposes, therefore, we will refer to respondent and H&H collectively as "respondent" unless the context requires otherwise.

executed, of the total base payments due under the lease. Unless there was a prior written consent by respondent, the commission was required to be paid if the property was leased, rented, transferred or made unmarketable by a voluntary act of the owner during the listing period.<sup>2</sup>

After obtaining the listing agreement, respondent proceeded to market and advertise the property for lease. In December 2004, respondent procured a tenant who wished to lease the property for two years at the requested rent. Appellant rejected the offer, saying she wanted more money. Respondent resumed marketing and showing the property.

In the spring of 2005, appellant approached Fleischman about opening a retreat on the property. She discussed with him the possibility of a joint venture to turn the property into a health retreat. On July 1, 2005, without respondent's knowledge or consent, appellant entered into a 10-year written lease agreement of the property with Bar Method of SoCal, LLC (Bar Method), of which Fleischman was a principal. The rental rate was \$11,000 per month, and the lease term was from September 1, 2005, to August 31, 2015. Appellant and Bar Method simultaneously entered into a letter of agreement to operate and share profits in a "first class sports related retreat for the Bar Method's friends, clients/members," which would provide "stretch and meditation classes, supervised hikes, organic meals and other related activities" on the property.

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<sup>2</sup> The agreement stated that "[appellant] ('Owner') hereby employs and grants [H&H] ('Broker') [during the listing period] the exclusive and irrevocable right to lease or rent the real property . . . ." Under the title "COMPENSATION," the agreement provided, in paragraph 3, that "A. Owner agrees to pay to Broker as compensation for services, irrespective of agency relationship(s): [¶] (1) For fixed term leases: [¶] (a) . . . (i) [x] 10.000 percent of the total rent for the term specified . . . (or if a fixed term lease is executed, of the total base payments due under the lease) . . . ." Paragraph 3.A.(3)(c) provided for such compensation: "If, without Broker's prior written consent, the Premises are withdrawn from lease/rental, are leased, rented, or otherwise transferred, or made unmarketable by a voluntary act of Owner during the Listing Period, or any extension."

Under the lease agreement, appellant was to receive from Bar Method a total rent of approximately \$1.3 million, for which a 10 percent commission under the exclusive lease listing agreement would amount to \$132,000. A handwritten and initialed proviso at the end of the letter of agreement, however, stated that either party could terminate the lease after three years if the enterprise had no net profit.

Appellant began making improvements to the property after signing the July 2005 agreements, and Bar Method began to market a health spa among its clients and conducted a preview of the property for potential clients in early September 2005. However, the enterprise never went into operation because of a disagreement between appellant and Bar Method over some of the arrangements.<sup>3</sup>

In August or September 2005, respondent learned for the first time from appellant that she had signed a lease with Bar Method. Appellant stated she had done “something wrong” and had signed a 10-year lease for the property with Bar Method on July 1, 2005. Respondent asked appellant for a copy of the lease and, after reviewing it, asked appellant to pay the commission called for under the exclusive lease listing agreement. Appellant refused, and this litigation ensued.

### **PROCEDURAL HISTORY**

Respondent filed a complaint for breach of contract and common counts against appellant in February 2006. Respondent sought payment of \$132,000 in commission under the exclusive lease listing agreement. Appellant answered and filed a cross-complaint against respondent, Fleischman and H&H.<sup>4</sup> In her operative first amended cross-complaint, appellant asserted claims for forgery, civil conspiracy, intentional

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<sup>3</sup> Appellant became unhappy with the terms of the agreements and began to renegotiate various terms with Fleischman. Appellant locked Bar Method out of the property in the latter part of September 2005. After tendering rent, Bar Method brought a lawsuit against appellant in October 2005.

<sup>4</sup> The trial court dismissed appellant’s claims against Fleischman, and appellant voluntarily dismissed her cross-complaint against H&H prior to trial.

infliction of emotional distress, breach of covenant of good faith and fair dealing, breach of fiduciary duty and declaratory relief.

At trial, appellant contended that she never entered into the exclusive lease listing agreement with respondent and her signature and initials were forged on that document. She claimed respondent conspired with H&H to fabricate the document and she was not bound by its terms.

Appellant asserted the lease agreement with Bar Method was merely a preliminary draft to use as a starting point for continued negotiations. She contended they never agreed upon the existence, validity, rent or terms for a lease, and the lease agreement was never finalized. Appellant also claimed Fleischman had told her he had obtained all necessary permits to operate a spa and had previously operated a spa at the property. She testified the lease agreement never went into effect because Bar Method canceled the deal.

An expert for appellant testified that under the standard form exclusive lease listing agreement if a lease does not commence through no fault of the property owner, there is no commission due; conversely, if the lease does not commence because of the fault of the owner, commission is owed.

The jury returned a verdict in favor of respondent on her claims for breach of contract and for goods and services rendered, awarding her damages of \$39,600 against appellant. The jury found in favor of respondent on all claims asserted by appellant in the cross-complaint. Based on the evidence and jury verdict, the court granted respondent declaratory relief and entered a judgment for respondent in the amount of \$39,600.

The trial court denied appellant's motions for judgment notwithstanding the verdict and new trial. Upon motion, the court awarded respondent attorney fees of about \$122,000 pursuant to Civil Code section 1717.

Appellant timely appealed the judgment including the award of attorney fees.

## CONTENTIONS

Appellant contends that (1) the underlying lease agreement was unenforceable because it violated public policy; (2) because the purpose contemplated by the lease was illegal, the agreement violates public policy and was unenforceable from its inception; and (3) the attorney fees the court awarded were grossly excessive.

## STANDARD OF REVIEW

We apply settled standards of review: “‘Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.’” (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271, quoting *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) In reviewing evidence on appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold a verdict if possible. (*Estate of Bristol* (1943) 23 Cal.2d 221, 223.)

The trial court has broad authority to determine the amount of a reasonable attorney fee. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*Drexler*).) “‘The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong[”]’ -- meaning that it abused its discretion.” (*Ibid.*, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

## DISCUSSION

### *1. Unenforceability of Lease Agreement*

Appellant contends the lease agreement with Bar Method was unenforceable because it violated public policy. She argues the clear purpose of the lease was for the lessee to operate a spa retreat on the property and such purpose is clearly spelled out in the initial lease agreement between appellant and Fleischman. Appellant submits the use contemplated by the parties violated the Los Angeles County building code, in particular sections 22.20.015, 22.20.020 and 22.20.100.<sup>5</sup> She asserts the evidence clearly shows that Fleischman intended to operate a spa retreat illegally without a conditional use permit, which itself was illegal.

Respondent asserts appellant's claim that the lease agreement was void, invalid or illegal under the building code was never raised by appellant in the trial court. Respondent argues the claim that the lease agreement violated public policy therefore does not deserve any consideration on appeal.

In her reply brief, appellant argues that the illegality of the lease agreement can be raised at any time, even on appeal. In any case, appellant claims she raised the issue of

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<sup>5</sup> Los Angeles County Code section 22.20.015 provides: "A person shall not use any premises in any residential zone except as hereinafter specifically permitted in this Title 22 and subject to all regulations and conditions enumerated in this title." Section 22.20.020, subdivision B. of the same code provides: "The following uses are prohibited: [¶] . . . [¶] --Yoga/spa retreat center. [¶] --Any other use which disrupts and is inconsistent with the residential character of the neighborhood is prohibited." Section 22.20.100 of the code allows for specified uses in single-family residence zones, "provided a conditional use permit has first been obtained . . . and while such permit is in full force and effect in conformity with the conditions of each permit . . . ."

We note that Los Angeles County Code section 22.20.070 permits a use including "Adult residential facilities, limited to six or fewer persons," and section 22.20.080 allows for accessory uses, including "Detached living quarters . . . for the use of temporary guests . . . of the occupants," and provides that "rooms may be rented to not more than four roomers" and "Rooms in a single-family residence may be rented to four or fewer residents." In light of our discussion, *post*, we need not decide if such uses are applicable here.

invalidity of the lease agreement in her summary judgment motion, albeit she did not cite the Los Angeles County building code in support of her motion. Appellant asserts that numerous cases recognize a correct decision in the trial court will be affirmed on appeal even if based on erroneous reasoning.

Appellant's assertions are not well taken.

In general, a party is precluded from urging any point on appeal not raised before the trial court; to permit otherwise would be unfair to the trial court and unjust to the opposing litigant. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.) This is because if the issue is raised in the trial court, the opposing side will have an opportunity to rebut it; but when no evidence on the issue is produced, the opposing party has no opportunity to present rebuttal evidence. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 117.) Thus, a party may raise a new theory on appeal only when the issue presented involves a purely legal question on an uncontroverted record and requires no factual determination. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

Even assuming for the sake of argument that the illegality of the lease agreement is purely one of law, appellant presented no evidentiary facts to the trial court establishing the lease agreement was void, invalid or illegal under the Los Angeles County building code. The issue was only indirectly and tangentially referred to in Fleischman's cross-examination, when appellant's counsel asked Fleischman whether he had ever submitted any applications with a county agency or coastal commission or health department "or anyone like that" in connection with his first idea for a health retreat sometime in 2000. Counsel elicited from Fleischman that he had researched the subject at the time by consulting an attorney, who told him there was a "possibility" a conditional use permit might be required and under whose guidance he made a decision to keep the operation small and seek a conditional use permit only "if somebody complained." However, Fleishman ultimately decided not to go forward with the idea.

He testified he told appellant of his earlier inquiries about a conditional use permit when they first met in 2004 or in a later discussion.

Other than Fleischman's testimony, appellant offered no evidence regarding any claimed illegality of using the property as a health retreat. Nor did she pursue with Fleischman his concept of keeping the operation "small" to circumvent any permit issues. More importantly, appellant did not adduce evidence on whether, if she had not locked Bar Method out of the property, Bar Method and Fleischman were required to or would have applied for a conditional use permit for the contemplated use of a "sports related retreat for the Bar Method's friends, clients/members." Had she done so, respondent would have had an opportunity to provide evidence in rebuttal on this issue.

In any case, the record is insufficient to establish the lease agreement was void, invalid or illegal. On appeal, appellant bases her theory of illegality on the allegation that respondent "well knew" that the purpose of the lease agreement was to operate a "spa-retreat" as a joint venture and that, as such, the contract was "clearly illegal" and in violation of public policy. Appellant bases this argument on her self-serving testimony at trial that (1) respondent told appellant that Fleischman had all the "necessary permits" to operate a health retreat, (2) appellant's agreement with Bar Method was conditioned on the agreement being subject to California law, and (3) appellant had discussed going forward with the health retreat with Fleischman only "if [we] have all the permits."

However, there was substantial conflicting evidence to the contrary at trial. Respondent testified she was not aware the parties had entered into a lease agreement until appellant called her in September 2005 and said, "I did something wrong. I signed this lease with Mark [and] Bar Method." Respondent testified before the lease agreement was signed she did not know appellant and Bar Method or Fleischman were contemplating a lease agreement, nor did respondent participate in any negotiations for the lease. Fleischman testified he did not think respondent had any idea he and appellant were considering forming a venture to run a health retreat on the property, and he did not consult respondent or speak with her regarding the matter. Fleischman also only testified he had consulted counsel regarding whether a conditional use permit might be required to

operate a health retreat and was simply advised there was a “possibility” a permit could be needed. Construing the testimony in the light most favorable to respondent, as we must, the issue of the legality of the lease agreement raised questions of fact, not purely an issue of law that can be raised for the first time on appeal.

The jury, moreover, clearly rejected appellant’s version of the events and found respondent and Fleischman credible.

## ***2. Validity of Lease Agreement***

Appellant contends that because the purpose contemplated by the lease was illegal, the agreement violated public policy and was therefore unenforceable from its inception. Appellant argues that respondent was aware of the purpose of the lease and “undoubtedly” had some knowledge of the legal requirements involved. She asserts, regardless of respondent’s knowledge or lack of knowledge, the lease’s illegal purpose rendered it unenforceable such that it could not be the basis of any commission liability for appellant. We disagree.

Appellant primarily relies on *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832 (*Bovard*) and *Shephard v. Lerner* (1960) 182 Cal.App.2d 746. In *Bovard*, the court held a contract for the sale of a drug paraphernalia manufacturing business was unenforceable because the consideration for the contract was contrary to the policy of express law and was therefore “illegal and void.” (*Bovard, supra*, at p. 838.) In *Shephard*, the court held a landlord could not collect rent for a hotel/apartment house when both parties knew before entering the lease agreement of numerous violations of local ordinances and state statutes in converting the building from a hotel to apartment uses, and the lease itself specifically authorized one violation and approved of past operations that were clearly in violation of the law. (*Shephard, supra*, at pp. 750-751.)

“Where the object of the contract is illegal, courts generally will not enforce it or lend assistance to a party who seeks to benefit from an illegal act. [Citation.]” (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1082.) Whether a contract violates public policy “necessarily involves a degree of subjectivity.” (*Bovard, supra*, 201 Cal.App.3d at p. 838.) “The power of the courts to declare a

contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.’ [Citation.] . . . [Citation.] ‘No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.’ [Citation.]” (*Stephens v. Southern Pacific Co.* (1895) 109 Cal. 86, 89-90; *Bovard, supra*, at p. 839.)

The burden is upon appellant to show the lease agreement violates settled public policy, or is “injurious to the morals” of the people of this state. Lacking a full evidentiary showing in the trial court, appellant cannot meet this burden.

Construing the evidence in the light most favorable to respondent, we must presume the lease agreement had an appropriate and legal purpose or that Bar Method would have obtained permits, if any were necessary, prior to placing the joint venture into operation. (*Stockburger v. Dolan* (1939) 14 Cal.2d 313, 316 [lease that contemplated action by governmental authorities before property might be used for specified purpose not illegal]; *Grace v. Croninger* (1922) 56 Cal.App. 659, 664-665 [assigned lease for saloon held enforceable notwithstanding liquor license issued to individual and not to his firm]; see *Baldwin v. Kubetz* (1957) 148 Cal.App.2d 937, 943 [assignee or sublessee subject to implied obligation to obtain necessary permit to drill upon land through a zone variance].) Appellant, who entered into the lease agreement knowing the possibility a permit might be necessary, cannot claim the illegality of a contract on such doubtful and uncertain grounds as appear from this record.

### **3. Attorney Fees Award**

The agreement between appellant and respondent contained an attorney fees clause. Paragraph 15 of the exclusive lease listing agreement provided: “In any action, proceeding or arbitration between Owner and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Owner or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Owner or Broker . . . .” In the present case, the jury found in favor of respondent and against appellant on the claim for

breach of contract in the complaint and upon all of the claims asserted in appellant's first amended cross-complaint. Under the exclusive lease listing agreement and legal authorities, the trial court found respondent to be the prevailing party, and appellant does not dispute that finding. Appellant focuses her challenge upon the amount of attorney fees awarded.

Appellant states that the jury awarded respondent a "mere 30%" of the commission she sought, but the trial judge nevertheless awarded in excess of \$122,000 in attorney fees. Appellant asserts it is "inconceivable" that respondent would have agreed to pay her attorney several hundred dollars an hour to handle this case when it appeared "questionable" from the outset, so her counsel more likely took the case on a contingency basis. Appellant suggests that the awarded fees are therefore "outrageously unreasonable" and subject to reversal. There is absolutely no evidence in the record to support a claim that respondent's counsel was retained on a contingency basis. Even if that were the case, the trial court properly awarded respondent reasonable fees.

Specifically, "the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*Drexler, supra*, 22 Cal.4th at p. 1095.) The trial court is not bound by any contingency fee contract, because the court's decision must be based on reasonableness. (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1227.)

We find no abuse of discretion by the trial court. Respondent asked the court to award attorney fees of \$174,875, representing a total of 349.75 hours billed at \$500 per

hour during the three-year period from November 2005 to September 2008. Respondent supported her fee request with declarations of counsel, who kept contemporaneous written time records reflecting the time spent performing such legal services, and counsel's monthly bills describing the time spent, dates and services performed and fees incurred. The trial court concluded the hourly rate of \$500 was excessive and the sum of \$350 per hour was reasonable for the services rendered. However, the court found the time spent by counsel was reasonable. The court made express findings that respondent was successful on the entire complaint and cross-complaint, appellant did not prevail on any claims and all the claims were "overwhelmingly intertwined." The court thus properly found the amount of \$122,412.50 was a reasonable sum to award as attorney fees.

Aside from a single California case, appellant relies primarily on federal trial court authorities in claiming the award of attorney fees was inappropriate. We are not constrained by opinions of federal courts on issues of state law. (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217; *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385-1386.) The only California case appellant cites, *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, confirms that a trial court has "broad discretion" to adjust a fee request downward to the extent it is concerned a particular fee request is excessive and reiterates that an appellate court reviews such award under the "deferential" abuse of discretion standard, i.e., the trial court's fee determination will not be disturbed unless the reviewing court is convinced it is clearly wrong. (*Id.* at p. 1322.)

#### **4. Attorney Fees on Appeal**

Respondent requests her attorney fees on appeal. "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise." (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499; see also *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) Civil Code section 1717 provides for an award of attorney fees and costs to "the party who is determined to be the party prevailing on the contract . . . ," and it does

not preclude recovery of attorney fees by a prevailing defendant on appeal. Hence, such fees are recoverable. (*Evans, supra*, at pp. 1499-1500; *Dove Audio, supra*, at p. 785.)

### **DISPOSITION**

The judgment is affirmed. Respondent is to recover costs on appeal, and the matter is remanded to the trial court to determine appropriate costs, including attorney fees, upon proper application.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.